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Supreme Court, U.S.
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No. 89-1116

IN THE SUPREME COURT

OF THE UNITED STATES

DISTRIBUTED FEB 20 1990

OCTOBER TERM, 1989

TED BISHOP, Petitioner

v.

OASIS OIL COMPANY, AND DAVID FOURACRES,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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(602) 322-5000
Attorneys for Respondents

19 pp

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OF THE UNITED STATES

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TED BISHOP, Petitioner

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OASIS OIL COMPANY, AND DAVID FOURACRES,
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Attorneys for Respondents

QUESTION PRESENTED

Whether the District Court properly exercised its discretion in dismissing Petitioner's Complaint as against all Respondents herein for failure to timely serve his Summons and Complaint in this matter pursuant to 28 U.S.C. § 4(j).

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SUMMARY OF ARGUMENT

In his Petition for a Writ of Certiorari, Petitioner Ted Bishop asks this Court to review a judgment of the Ninth Circuit Court of Appeals affirming the Arizona District Court's dismissal of his personal injury diversity action for failure to timely serve Respondents. A federal court has inherent authority to dismiss actions for failure to prosecute and this Court should not disturb a district court dismissal unless it appears that the lower court clearly abused its discretion.

In this case, the District Court acted well within the permissible range of its discretion in dismissing Petitioner's lawsuit. The District Court gave Petitioner several opportunities through time extensions over a one year period of time to serve Respondents, during which, on at least two occasions, Petitioner was warned through

court order that failure to serve in the time allotted would result in dismissal. Petitioner also has never offered any excuse for failing to follow the District Court's final order with respect to service of process.

Based on this record, it cannot be said that the District Court abused its discretion and Petitioner's request for a Writ of Certiorari should be denied.

ARGUMENT

PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT FOR FAILURE TO SERVE RESPONDENTS.

This is a personal injury diversity action arising out of an automobile accident which allegedly occurred in Libya in July, 1984. Petitioner Ted Bishop alleges that he was riding in a jeep with Respondent David Fouracres, a British citizen employed by respondent Oasis Oil Company ("Oasis") when it hit a soft spot resulting in injuries to Bishop.

On July 25, 1986, three days before the applicable statute of limitations was to expire, Bishop filed his Complaint in the United States District Court for the District of Arizona (the "District Court"). One year later, on July 31, 1987, after numerous time extensions were given to serve process, and after at least twice being

warned that failure to comply with the District Court's order requiring service on Respondents within the time allotted would result in dismissal, Petitioner's Complaint was dismissed by the District Court for failure to serve Respondents.

Petitioner appealed the District Court's dismissal to the Ninth Circuit Court of Appeals and the Ninth Circuit affirmed the dismissal. Through his Petition for a Writ of Certiorari, Petitioner now asks that this Court review the District Court's sua sponte dismissal.

Whether or not the District Court's dismissal should be reviewed is governed by this Court's decision in Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). In Link v. Wabash R. Co., this Court reviewed the dismissal by the district court of Link's case for failure to attend a pretrial conference. In affirming the

dismissal, the Court recognized as "unquestioned" a federal district court's "inherent power" to dismiss cases sua sponte "to achieve the orderly and expeditious disposition of cases", 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734, and held that "[w]hether such an order [dismissing a case sua sponte] can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." 370 U.S. 626, 633, 82 S.Ct. 1386, 8 L.Ed.2d 734. The Court reviewed the record and circumstances behind the dismissal, including the history of the case and numerous earlier failings of petitioner which caused delay in the case, and concluded that "we are unable to say that the District Court's dismissal of this action for failure to prosecute . . . amounted to an abuse of discretion." 370 U.S. 626, 633, 82 S.Ct. 1386, 8 L.Ed.2d 734.

Applying the standards set forth in Link v. Wabash R. Co., supra, a review of the record in this case shows that the District Court did not abuse its discretion when it dismissed Petitioner's Complaint. To the contrary, the record shows that the District Court gave petitioner over one year to properly file his Complaint and serve Respondents before it dismissed the action. Petitioner filed his case on July 25, 1986. On August 29, 1986, the District Court gave Petitioner a sixty day extension to find and serve Respondents, with a warning that otherwise "the case shall be dismissed." Appendix B, Page i.[1] On October 31, 1986, the District Court gave Petitioner another

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[1]"Appendix B" refers to the Appendix which immediately follows the text of this Response. The Appendix is designated "Appendix B" to distinguish it from the Appendix attached to Petitioner's Petition for Writ of Certiorari which has been designated as "Appendix A."

sixty days to serve Respondents. Appendix B, Page ii. On December 11, 1986, Petitioner's counsel was allowed to withdraw from the case (Appendix B, Page iii), and on December 23, 1986, Petitioner's new counsel made a request for an extension of time to file an Amended Complaint and serve Respondents. Appendix B, Page iv. On December 30, 1986, the District Court granted this request and gave Petitioner until March 2, 1987, to file his Amended Complaint. Appendix B, Page v. Petitioner filed his Amended Complaint on February 24, 1987, but failed to serve Respondents, and on March 10, 1987, the District Court issued a Minute Order setting a March 30, 1987, hearing for Petitioner Bishop to "show cause why this case should not be dismissed for failure to serve any defendant within the extensions granted by this Court . . . ." Appendix B, Page vi. This March 30, 1987

hearing date was reset to April 2, 1987, and later to June 1, 1987, giving Petitioner additional time to obtain service. Appendix B, Pages vii and viii. On June 1, 1987, the District Court entered an Order vacating the June 1, 1987 deadline and set June 8, 1987 as the date for Petitioner to "show cause why this action should not be dismissed as to defendant David Fouracres, who has not been served since the case was filed on July 25, 1986", and further set July 1, 1987 as the date by which Petitioner "shall file a brief showing why the service he has effected on the corporate defendant [Oasis] is valid . . . ." Appendix B, Page ix. On June 16, 1987, the District Court granted Petitioner another thirty days to serve Respondent Fouracres.[2] Appendix B, Page x.

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[2] On this same date, the District Court also vacated a default judgment, which was entered following service on Oasis, because service on Oasis was revealed to be

No brief was filed by Petitioner by July 1, 1986 demonstrating valid service on Oasis. After the July 16, 1987 deadline for serving Respondent Fouracres passed, the District Court, on July 31, 1986, dismissed Petitioner's Complaint for "failure to serve the defendants within the limit of Fed.R.Civ. 4(j) and of court authorized extensions to the time limits thereof."[3] Appendix B, Page xi.

Given this record, it cannot be said that the District Court abused its discretion in dismissing Petitioner Ted Bishop's Complaint. The District Court, over a one year period of time, gave numerous time extensions to properly serve

---

defective.

[3]A more complete summary of the record of this case can be found in the Ninth Circuit Court of Appeals' unpublished opinion affirming the District Court's dismissal found at Page iii of Appendix A, attached to Petitioner's Petition for Writ of Certiorari.

Respondents Oasis and Fouracres, and repeatedly warned Petitioner that failure to abide by its orders dealing with service of process would result in dismissal.[4] Significantly, Petitioner has failed to give any excuse for his failure to follow the District Court's June 1, 1987 Order (Appendix B, Page viii) which, when not followed, resulted in the dismissal.[5] Under these circumstances, and according to standards established by this Court twenty-

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[4]The Ninth Circuit recently held that warnings by the district court that dismissal will result for failure to abide by court orders is sufficient basis to support a sua sponte dismissal. Greco v. Stubenberg, 859 F.2d 1401, 1404 (9th Cir. 1988).

[5] Nor is there any argument that dismissal of Petitioner's Complaint because of his counsel's unexcused failure to abide by court orders imposes an unjust penalty on the client. As pointed out by Mr. Justice Harlan in Link v. Wabash R. Co., 370 U.S. 626, 634-35, n.10, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), a client is held to accept the consequences of freely selecting his counsel, is bound by the counsel's inaction, and has the remedy of a malpractice action against his counsel.

eight years ago in Link v. Wabash R. Co., supra, the District Court's discretion was properly exercised. Petitioner Bishop's Petition for a Writ of Certiorari, therefore, should be denied.

CONCLUSION

For the foregoing reasons, and as per the standards set out in Link v. Wabash R.Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), Petitioner Ted Bishop's Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 16 day of February, 1990.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C

By: _____

David C. Anson
2525 East Broadway Blvd.
Suite 200
Tucson, Arizona 85716-5303
(602) 322-5000
Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in the County of Pima, State of Arizona, in the offices of DeConcini McDonald Brammer Yetwin & Lacy, P.C., and am a member of the bar of this Court. My business address is 2525 E. Broadway, Suite 200, Tucson, Arizona 85716. On February 16, 1990, I served upon the Petitioner the following:

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Thomas J. Davis
DAVIS & EPPSTEIN, P.C.
110 South Church Avenue
Box 48
Tucson, AZ 85701-1603
Attorneys for Petitioner

and

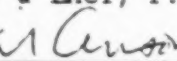
Of Counsel:
William B. Blaser
WILLIAM B. BLASER, P.C.
7493 North Oracle Rd, Suite 105
Tucson, AZ 85704

and by placing the original and forty copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mail box at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Joseph F. Spaniol, Jr.
Clerk of the United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Executed on February 16, 1990, at Tucson, Arizona. I certify under penalty of perjury that the foregoing is true and correct.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By 
David C. Anson
2525 East Broadway Blvd, #200
Tucson, Arizona 85716
Attorneys for Respondent

APPENDIX B

(2)

FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TED BISHOP, Plaintiff,	NO. CIV. 86-423 TUC WDB
vs.	ORDER
OASIS OIL CO. and DAVID FOURACRES, Defendants.	

Plaintiff having requested additional time to ascertain the present corporate status of Defendant Oasis Oil, and good cause shown therefor,

IT IS ORDERED that Plaintiff comply with the court Order of August 21, 1986 by sufficiently alleging the citizenship of the corporate defendant in an amended complaint within 60 days from the date of this Order, or the case shall be dismissed.

Dated August 29, 1986.

William D. Browning

WILLIAM D. BROWNING
U.S. District Judge

MARSHALL D. TANDY
ATTORNEY AT LAW
271 NORTH STONE AVENUE
TUCSON, ARIZONA 85701
(602) 622-XXXX
PIMA COUNTY ATTORNEY NUMBER 5XXX

LODGED
OCT 29 1986
CLERK, U. S. DISTRICT COURT
DISTRICT OF ARIZONA
BY DEPUTY

FILED
OCT 31 1986
RICHARD H. WEARE, CLERK
U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY DEPUTY CLERK

Attorney for

IN THE UNITED STATES DISTRICT COURT

STATE OF ARIZONA

DISTRICT OF PIMA

TED BISHOP, Plaintiff, vs. OASIS OIL COMPANY, a Delaware corporation, et al., Defendants.	NO. CIV 86-423 TUC WDB ORDER

UPON request of counsel and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff may have an extension of sixty (60) additional days in which to obtain service on the Defendants. Said sixty (60) days will run on December 31, 1986.

DONE IN OPEN COURT this 31 day of October, 1986.

William D. Browning
WILLIAM D. BROWNING

MARSHALL D. TANDY
ATTORNEY AT LAW
271 NORTH STONE AVENUE
TUCSON, ARIZONA 85701
(602) 622-3030
PIMA COMPUTER NUMBER 08420

LODGED
NOV 25 1986
CLERK, U. S. DISTRICT COURT
BY: DISTRICT OF ARIZONA
DEPUTY

FILED
DEC 11 1986
RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY
DEPUTY CLERK

Attorney for

IN THE UNITED STATES DISTRICT COURT

STATE OF ARIZONA

DISTRICT OF PIMA

TED BISHOP,

Plaintiff,

vs.

OASIS OIL COMPANY, et al.,

Defendants.

NO. CIV 86-423 TUC WDB

O R D E R

UPON Motion of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that Marshall D. Tandy may withdraw as counsel for Plaintiff in this action.

DONE IN OPEN COURT this 4 day of December, 1986.

William D. Browning

WILLIAM D. BROWNING

FILED
Dec 22

William B. Blaser/gm
BLASER, KELLY & DON, P.C.
7493 North Oracle Road, Suite 105
Tucson, Arizona 85704
(602) 297-8386
Pima County Computer No. 4384

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TED BISHOP, Plaintiff, vs. OASIS OIL COMPANY OF LYBIA, a Delaware corporation, et al., Defendants.	CIV 86-423 TUC WDB MOTION TO EXTEND DEADLINE PREVIOUSLY SET BY THE COURT

COMES NOW the Plaintiff, by and through the undersigned attorneys, and requests this Court for an additional extension for time to prepare the Amended Complaint and to obtain service on the Defendants in the above captioned case. The undersigned attorneys have just been retained in this matter, and have agreed to assist and go forward with this case. Plaintiffs have just received information from the State of Delaware confirming the citizenship of the Defendant, OASIS OIL COMPANY OF LIBYA, INC. Plaintiffs need additional time to complete their investigation and thereafter prepare the Amended Complaint with the appropriate jurisdicational allegations as requested by the Court in its Order of August, 1986.

This request is not made for the purposes of delay, and is made for the purposes of justice.

RESPECTFULLY SUBMITTED this 23rd day of December, 1986.

BLASER, KELLY & DON, P.C.

By: Wm. B. Blaser
WILLIAM B. BLASER
Attorney for Plaintiff

LODGED

DEC 23 1986

CLERK, U. S. DISTRICT COURT
DISTRICT OF ARIZONA
BY: _____ DEPUTY

FILED

DEC 23 15 '86

William B. Blaser/gs
BLASER, KELLY & DON, P.C.
7493 North Oracle Road, Suite 105
Tucson, Arizona 85704
(602) 297-8386
Pima County Computer No. 4384

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TED BISHOP,

Plaintiff,

vs.

OASIS OIL COMPANY OF LIBYA, a Delaware corporation, et al.,

Defendants.

CIV 86-423 TUC WDB

ORDER

THE COURT having been presented with a Motion to Extend the Deadline of December 31, 1986; the Court having considered the same; the Court finding good cause therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the deadline of December 31, 1986 within which to file the Amended Complaint is hereby extended to the 2nd day of March, 1987.

DONE IN OPEN COURT this 30 day of December, 1986.

William D. Browning
The Honorable William D. Browning
U.S. District Judge

BLASER KELLY & DON P.C.

Kelly
Blaser
Don

UNITED STATES GOVERNMENT

memorandum

FILED

MAR 10 1987

CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY DEPUTY CLERK

March 10, 1987

HON. WILLIAM D. BROWNING

MINUTE ORDER

Clerk's Office
U. S. District Court

Please enter the following order and notify counsel:

CASE NO. CIV 86-423 TUC WDB

TITLE: Ted Bishop v. Oasis Oil Company

IT IS ORDERED that a hearing shall be held on **MONDAY, MARCH 30, 1987 at 9:15 a.m.** at which time the plaintiff shall show cause why this case should not be dismissed for failure to serve any defendant within the extensions granted by this Court to the time limit in Fed. R. Civ. P. 4(j).

X copies issued to: Blaser, wdb

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10
REV. 1-80
GSA FPMR (41 CFR) 101-11.6
5010-114

UNITED STATES GOVERNMENT

memorandum

DATE March 18, 1987

REPLY TO ATTN OF HON. WILLIAM D. BROWNING

SUBJECT MINUTE ORDER

FILED

MAR 19 1987

TO Clerk's Office
U. S. District Court

Please enter the following order and notify counsel:

CASE NO. CIV 86-423 TUC WDB

TITLE: Ted Bishop v. Oasis Oil Company

IT IS ORDERED that the Order to Show Cause hearing ~~presently~~ SET for MONDAY, MARCH 30, 1987 at 9:15 a.m. is VACATED.

IT IS FURTHER ORDERED that the Order to Show Cause ~~hearing to~~ RESET for 8:45 a.m. on THURSDAY, APRIL 2, 1987.

Copies issued to:
Blasier, Cobb

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIVIL MINUTES - GENERAL

Civil Case No. 86-423-PHX-WDB Date: April 2, 1987

Title: Sid Bishop vs. Oasis Oil Co.

PRESENT:

HON. William D. Browning JUDGE

Veteran Moreno
Deputy Clerk

William A. Risen
Court Reporter

ATTORNEY(s) FOR PLAINTIFF(s)

William Blaser

ATTORNEY(s) FOR DEFENDANT(s)

FILED
APR 2 1987
RICHARD H. WEARE, CLERK
U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY [illegible] DEPUTY

PROCEEDINGS: X Open Court ___ Chambers ___ Other

Hearing on Order to Show Cause.

Hearing is held

Order this hearing is continued to Monday, June 1, 1987 at 2:00 pm

Files issued to: Blaser with (18)

FILED

IN THE UNITED STATES DISTRICT COURT '87

FOR THE DISTRICT OF ARIZONA

TED BISHOP,

Plaintiff,

v.

OASIS OIL COMPANY OF LIBYA, et al.,

Defendants.

No. CIV 86-423 TUC-RMB

ORDER

This case was set for hearing on an Order to Show Cause why the matter should not be dismissed for failure to serve the defendants, and the Court on the request for entry of default against the corporate defendant as of this date.

IT IS ORDERED:

1. The hearing, set for June 1, 1987, is hereby VACATED.

2. The hearing is RESET for June 8, 1987, at 9:30 a.m., at which time the plaintiff shall show cause why this action should not be dismissed as to defendant David Fouracres, who has not been served since the case was filed on July 25, 986.

3. By July 1, 1987, the plaintiff shall file a brief showing why the service he has effected on the corporate defendant is valid by setting forth the appropriate Delaware statutory provision and any facts necessary to show the effectiveness of that statute in this case.

4. Unless good cause is shown for an extension, the plaintiff shall

Blaser
cwb

file a request for entry of judgment in this matter no later than October 1, 1987, or the case shall be dismissed.

Dated this 10th day of June, 1987.

WILLIAM D. BROWNING
U.S. District Judge

(x)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIVIL MINUTES - GENERAL

Civil Case No. 86-423-TUC-WDB Date: 6/16/87

Title: Jed Bishop vs. Oasis Oil Co.

PRESENT:

HON. William D. Browning JUDGE

Patricia Morena
Deputy Clerk

Toni Karena
Court Reporter

ATTORNEY(s) FOR PLAINTIFF(s)

William Blaser

ATTORNEY(s) FOR DEFENDANT(s)

FILED

JUN 17 1987

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY DEPUTY CLERK

PROCEEDINGS: ✓ Open Court ___ Chambers ___ Other

Order to Show Cause:

Order dis default entered against defendants Oasis Oil is Vacated.

Further order the order to show cause is continued for a period of thirty days and if at that time the service has been made on Defendant this case will be dismissed as to that defendant

Copies issued to:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TED BISHOP,

Plaintiff,

v.

OASIS OIL CO. OF LIBYA, et al.,

Defendants.

No. CIV 86-423-TUC-WDB

ORDER

The complaint in this case was filed on July 25, 1986. The complaint alleges that defendant David Fouracres is a citizen of the United Kingdom, and that Oasis Oil Company was believed to be a Delaware corporation. On August 21, 1986, plaintiff's counsel advised the Court that Oasis Oil was believed to have dissolved its Delaware charter the month before.

There have been numerous extensions and several hearings to show cause why the case should not be dismissed for failure to serve the defendants in the year since this complaint was originally filed. On each such occasion, counsel for plaintiff indicated that service was imminent. Service was finally made upon the Secretary of State for Delaware, apparently pursuant to a Delaware law that authorizes the Secretary to continue as statutory agent for corporations for three years following their dissolution, a result which could have obtained as early as August 21, 1986, when plaintiff's counsel first advised the Court that Oasis Oil was a defunct Delaware corporation.

The last OSC was scheduled for June 1, 1987, and continued to June 15, 1987. At that time, on plaintiff's motion the Court set aside the default against Oasis Oil for some defect in the service that had been made by the Delaware Secretary of State, and further ordered that claims against David

Fouracres would be dismissed if he were not served within thirty days. De
plaintiff's counsel advises this Court that the defendant may have been serv
on July 25, 1987. The Court's record shows no further action by plaintiff t
correct service as to the defunct Delaware corporation. Dismissal pursuant t
Fed. R. Civ. P. 4(j) appears well warranted on the record now before the Cour
in this matter. See Edwards v. Edwards, 754 F.2d 298 (9th Cir. 1985).

IT IS ORDERED that this case is DISMISSED as to all defendants for failure to serve the defendants within the limits of Fed. R. Civ. P. 4(j) and of Court authorized extensions to the time limits thereof.

DATED this 31 day of July, 1987.

William D. Browning

WILLIAM D. BROWNING
U.S. District Judge